(1)
Supreme Court, U.S.
FILED
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No. 00-874

In the Supreme Court of the United States

MICHAEL S. MATTHEWS,

Petitioner,

v.

HOWARD COUNTY, MARYLAND; CHARLES ECKER; BARBARA KRANKOWSKI; RAQUEL SANUDO; JAMES N. ROBEY; WAYNE LIVESAY; JIMMIE LYNN SAYLOR; and GWEN K. WEST,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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37pp

QUESTION PRESENTED

I. Can an employer assert as an affirmative defense to liability, that a plaintiff job applicant would not have been hired, despite admitted unlawful discrimination, after enactment of the Civil Rights Act of 1991?

PARTIES TO THE PROCEEDINGS

Petitioner is Michael S. Matthews. He was plaintiff in the District Court and appellant in the Court of Appeals.

Respondents are Howard County, Maryland, a Charter entity, Charles Ecker, Barbara Krankowski, Raquel Sanudo, James N. Robey, Wayne Livesay, Jimmie Lynn Saylor, and Gwen K. West. They were defendants in the District Court and appellees in the Court of Appeals.

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Petitioner Michael S. Matthews ("Matthews") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

The initial question presented is simple: Is proof that an employer would have made the same employment decision an affirmative defense to liability in a case of employment discrimination? The answer, under the plain meaning of the relevant statute and according to well-established precedent in all circuits that have considered the issue, is "No." The Court of Appeals' decision, however, reaches a contrary conclusion, and, if left to stand, would conflict with the statute as well as this Court's and all of those Courts of Appeals' case law.

Matthews respectfully suggests granting certiorari, or, in the alternative, summary reversal of the Court of Appeals decision.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals (App. 3a) is not reported. The decision of the District Court (App. 7a) dismissing the Title VII claim at issue is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 2000. The Court of Appeals denied a petition for rehearing and rehearing en banc in an order dated and entered on September 19, 2000. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTOIRY PROVISIONS INVOLVED

1. The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m), provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

3. The Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985, and 1986, provides federal civil causes of action against individuals who act under color of State law to intentionally deprive persons of rights protected by federal statute or the Constitution, as well as against those who conspire to deprive others of those rights, or who neglect or fail to prevent such conspiracy.

FACTUAL SUMMARY

The United States Equal Employment Opportunity Commission ("EEOC") found, and Howard County concedes, that the County used a discriminatory hiring process in 1995. (App. 10a.) Under this process, most applicants only had to score two out of a possible three "Excellents" in their

interview to be considered for employment. (App. 9a.) Individuals of Matthews's race and sex, however, were required to score three out of three "Excellent" scores to be considered for employment. (App. 10a.) Matthews scored two "Excellents," and was thus not considered for employment under this discriminatory scheme. Other individuals, who likewise scored only two Excellents but who were of a race and sex different from Matthews, were considered and hired by Howard County. (App. 10a.) These facts are uncontested.

PROCEDURAL HISTORY

Matthews is a decorated, twenty-year veteran of the District of Columbia Metropolitan Police Department, who filed suit against Howard County under Title VII and the Age Discrimination in Employment Act (the ADEA claim was subsequently dropped). (App. 7a.) The Complaint properly alleged timely filing of charges of discrimination with the EEOC, and the Determination by the EEOC, after a three-year investigation, that Howard County had in fact unlawfully discriminated against a protected class. Conciliation sponsored by the EEOC lasted the greater part of a year before the EEOC referred the matter for prosecution by the Civil Rights Division of the Department of Justice ("DOJ"). DOJ instead issued a Notice of Right to Sue Letter to Matthews.

Additional counts of the Complaint alleged that Howard County and its individual officers were liable for violations of 42 U.S.C. § 1983, in acting under color of State law to violate Matthews's due process and equal protection rights under the Fourteenth Amendment. The Complaint also alleged violations of

42 U.S.C. §§ 1985 and 1986 against the individual defendants, for conspiracy to violate established constitutional rights and their respective neglect or failure to prevent those constitutional violations. The Complaint sought a declaration that Matthews's rights had been violated; equitable relief to vindicate Matthews's rights to be free of discrimination as to race and sex; and compensatory and punitive damages for the denial to Matthews of the right to compete on an equal footing.

Howard County moved to dismiss, or in the alternative for summary judgment. (App. 7a.) Matthews cross-moved for partial summary judgment as to liability and for class certification. (App. 7a.)

Before the District Court, Howard County argued that it was not liable because Matthews would not have been hired even in the absence of unlawful discrimination. (App. 12a.) The District Court accepted this affirmative defense and dismissed the Complaint. It found that "[n]o reasonable fact finder could find that plaintiff would have been hired over the white males that received better scores than he. Therefore, the underlying factual premise of plaintiff's damage claim is fatally flawed." (App. 12a.) For support, the court cited *Alexander v. Estepp*, 95 F.2d 312 (4th Cir. 1996), *cert. denied*, 520 U.S. 1165 (1997). The court likewise ruled that Matthews's constitutional claims were time-barred and denied class certification. (App. 15a.)

Matthews appealed to the Court of Appeals, which affirmed the District Court's decision in a per curiam screening panel opinion. (App. 3a.) The panel likewise cited *Alexander*. The opinion makes no examination of whether the race and sex

discrimination was the cause for Matthews's dismissal from the hiring process, or if such causation should even matter under a Title VII analysis. Instead, the opinion merely states "we agree with the district court's holding that Matthews failed to assert a viable claim of employment discrimination that would entitle him to relief. *See Alexander v. Estepp*, 95 F.3d 312, 317 (4th Cir. 1996)." (App. 4a.)

In *Alexander*, unsuccessful job applicants to the Prince George's County, Maryland Fire Department sued under 42 U.S.C. § 1983 for violation of their constitutional right to equal protection of the laws, when minority applicants, who ranked lower than those applicants did on a merit list, were hired. The Fourth Circuit in *Alexander*, applying this Court's holding in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), ruled that the Prince George's County affirmative action program was not narrowly tailored and therefore violated the Fourteenth Amendment's Equal Protection Clause. 95 F.3d at 315-316.

All but one of the *Alexander* plaintiffs, however, ranked too low to have been hired on the merit system, even absent the advancement of lower-ranked minority applicants ahead of them. Accordingly, the Fourth Circuit in *Alexander* held that because "the existence of the affirmative action program did not cause them to be denied employment opportunity, the plaintiffs (except Reedy) may not be awarded any personal relief." *Id.* at 317. The *Alexander* plaintiffs did not invoke, and the *Alexander* opinion nowhere discussed, Title VII of the Civil Rights Act.

Matthews next petitioned the Court of Appeals for rehearing and rehearing en banc, pointing out the courts' reliance on a Section 1983 opinion to decide a

Title VII issue. The Court of Appeals held the petition for three months, before it denied rehearing. (App. 1a.)

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT DEPARTED FROM THE UNIFORM HOLDING OF OTHER CIRCUITS THAT TITLE VII, AS AMENDED IN 1991, EMBRACES ALL CLAIMS BY INDIVIDUALS SUBJECTED TO ILLEGAL DISCRIMINATION.

A. The Civil Rights Act of 1991 Granted an Affirmative Defense Only as to Certain Remedies, and Statutorily Altered the Former Rule of This Court That Demonstrating a Different Outcome in a Challenged Employment Decision Was a Part of the Plaintiff's Case.

Assuming *arguendo* that the District Court correctly held that Matthews would not have been hired even in the absence of unlawful discrimination, he still has a claim. The language of the 1991 Civil Rights Act makes this clear:

> An unlawful employment practice is established when the complaining party demonstrates that race, Color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m). The 1991 Act reinforced the presence of liability, specifying that relief is available even when an employer "demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B). The congressional report accompanying the 1991 Act removed any vestige of doubt:

> [P]roof that an employer would have made the same employment decision in the absence of discriminatory reasons is relevant to determine *not the liability* for discriminatory practices, *but only the appropriate remedy*. ...
> .... [T]he complaining party must demonstrate that discrimination *actually contributed* or was otherwise *a factor in* the employment decision or *action*. .... [A]n employer may be held liable for any discrimination that is actually shown to play a role in the contested employment decision.

H.R. Report No. 102-40 (I) at 48, *reprinted in* 1991 U.S.C.C.A.N. 549, 586 (emphases both added and original).[1]

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[1] Race was admitted to be a motivating factor in Howard County's decision not to hire Matthews. The County concedes that, had Matthews been of a different race, his application would have advanced in the hiring process. Other applicants with Matthews's scores were considered and, in fact, hired. (App. 10a.) Had

The conceded facts in this case further support Matthews's claim under Title VII for relief. Unlike the situation in *Alexander*, the dismissal of Matthews from the Howard County hiring process was not independent of the unlawful discrimination. Matthews did not fail to make a cutoff on an otherwise unbiased merit list. Howard County hired applicants with scores identical to Matthews's scores. (App. 10a.) Howard County therefore could (and would) have hired Matthews but for his race and sex.

B. All Courts of Appeals Other Than the Fourth Circuit Adhere to an Interpretation of Title VII Under Which Matthews Stated a Cause of Action Because He Was Subjected to Intentional, Unlawful Discrimination Based on His Race.

All Circuits, other than the Fourth Circuit, that have considered this question have agreed that a plaintiff may maintain a claim for relief even if he would not have been hired absent unlawful discrimination. *See, e.g., Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) ("the employee may be entitled to equitable relief so long as he has proven that the proscribed factor played some part in the decisional calculus"); *Mardell v. Haleysville Life Ins. Co.*, 31 F.3d 1221, 1232 (3rd Cir. 1994)

Matthews's race been different, he would not have been dismissed. It is thus undisputed that race was a motivating factor.

("plaintiff is entitled to some relief even if the employer actually would have taken the same action at the same time absent any invidious motive"), *vacated for reconsideration on other grounds*, 514 U.S. 1034 (1995); *Excel Corp. v. Bosley*, 165 F.3d 635, 638 (8th Cir. 1999) ("an employee is entitled to relief if he or she proves that impermissible discrimination was a 'motivating factor' in the employment decision, 'even though other factors also motivated' the employer's decision"); *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 761 (9th Cir. 1996) ("liability in mixed-motive cases is deemed established once the employee shows that a discriminatory criterion was a motivating factor in the employer's decision"); *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 552 (10th Cir. 1999) (Section 107 "overruled the Supreme Court's decision in *Price Waterhouse* to the extent that that decision holds an employer can avoid a finding of liability"); *Harris v. Shelby County Bd. of Educ.*, 99 F.3d 1078, 1084 (11th Cir. 1996) ("plaintiff in a Title VII action prevails whenever he or she proves that one of the delineated characteristics was a motivating factor behind a particular employment decision, even if there were other, even legitimate, factors motivating that decision as well").

Yet the District Court in this case applied a completely contrary standard, ruling that "it would be speculative to infer that plaintiff would have been hired *but for* the alleged discrimination," and therefore dismissed the Complaint. (App. 12a (emphasis added).)

Alexander v. Estepp, 95 F.3d 312 (4th Cir. 1996), *cert. denied*, 520 U.S. 1165 (1997), the case upon which the District Court and the Court of Appeals both relied, does not support this interpretation of the law under

Title VII. The cited portion, and indeed the entire holding, of *Alexander* concerns Section 1983 claims. The Fourth Circuit erred in extending the reasoning of that case to the Title VII context, because the two statutes set out completely different standards of causation. *See, e.g., Texas v. LeSage*, 528 U.S. 18, 120 S. Ct. 467, 468 (1999) (per curiam) (Under § 1983, "the government can avoid liability by proving that it would have made the same decision without the impermissible motive."). Congress specifically changed the causation standard under Title VII, in the 1991 Civil Rights Act, in order to allow plaintiffs to maintain a claim, even if they could not prove that they would have been hired absent the unlawful discrimination.

II. SUFFICIENT GROUNDS EXIST FOR SUMMARY DISPOSITION OF THIS CASE.

Rule 16.1, governing the Court's dispositions of petitions for certiorari, provides that an appropriate order in a given case "may be a summary disposition on the merits." Sup. Ct. Rule 16.1. Some cases are thought important enough to justify review, but not difficult enough to necessitate full briefing and oral argument. The Court is clearly empowered by the provisions of 28 U.S.C. § 2106 to make such a disposition in the interest of justice.

A clearly erroneous decision correctible by summary reversal should involve an error of greater magnitude than the mere technical, harmless, or parochial error. *See Eaton v. Tulsa*, 415 U.S. 697, 707 (1974). In this case, the decision of the courts below directly contravenes the specific language of the 1991

Civil Rights Act. By ignoring the direct language of Congress forbidding intentional discrimination, the Fourth Circuit placed itself at odds with all other circuits that have considered the question, and that court cut off the federal statutory rights of all individual job applicants across the Fourth Circuit. Such a result is anything but harmless.[2]

In *Texas v.LeSage*, 520 U.S. 18, the Court has recently made a summary dispostion of a case that presented a mirror image to this one. In *LeSage*, the Fifth Circuit had reversed a district court's summary judgment for the defendants in a Section 1983 case, on the basis that LeSage had made out a claim under Section 1983 even if the facts were ultimately to show that he would not have been admitted to the challenged academic program under a race-neutral policy. This Court reversed the Fifth Circuit in a per curiam, summary disposition, ruling that prior precedents in the Section 1983 context made clear that causation under Section 1983 was stricter than the Title VII standard. *Texas v. LeSage*, 520 U.S. 18, 120 S. Ct. 467 (1999) (per curiam) (granting certiorari and reversing Section 1983 claim, while leaving other matters open on remand). Where the Fifth Circuit in *LeSage* wrongly applied a Title VII-like standard to a Section

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[2] At least one circuit has ruled that unpublished opinions are constitutionally entitled to precedential value and effect. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000). Accordingly, the Fourth Circuit's ruling, left undisturbed, threatens significant disruption of future civil rights holdings enforcement in that circuit, if not in others as well.

1983 case, here the Fourth Circuit has wrongly applied the Section 1983 standard to a Title VII claim.

The material facts in this case are uncontested. The rule of federal law is clear and set forth directly in the language of the statute. And the decision of the courts below rests unequivocally on a simple and straightforward, yet demonstrably incorrect, statement of the law.

The Court can redress the serious error of the courts below without undue investment of time in briefing and oral argument, by summarily reversing the Fourth Circuit's holding. Alternatively, the Court might vacate and remand this case for reconsideration in light of the Civil Rights Act of 1991. *Cf. Bureau of Economic Analysis v. Long*, 454 U.S. 934 (1981).

* * * * *

Michael Matthews, a 20-year veteran of the Washington, D.C. police force, was qualified to join the Howard County Police Department, in that he met the hiring qualifications for women or non-whites, and he would have been hired, had his race or sex been different. Other applicants with his score of two Excellents were hired, thus Matthews himself could have been hired.

The Court should uphold the strong policy against intentional discrimination and grant certiorari, or, in the alternative, summarily reverse the Court of Appeals, to address the inconsistencies between its per curiam opinion and the well-established law.

CONCLUSION

For the reasons set forth above, the Court should grant the Petition for Certiorari and summarily reverse the judgment below, or in the alternative, remand for further proceedings consistent with the Civil Rights Act of 1991.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Fourth Circuit

FILED
September 19, 2000

No. 99-2654
CA-99-2032-JFM

MICHAEL S. MATTHEWS, in his own right, and as representative on behalf of a class of plaintiffs similarly situated

Plaintiff-Appellant

v.

HOWARD COUNTY, MARYLAND, a charter entity; CHARLES ECKER, in both his individual and official capacities; BARBARA KRANKOWSKI, in both her individual and official capacities; RAQUEL SANUDO, in both her individual and official capacities; JAMES N. ROBEY, in both his individual and official capacities; WAYNE LIVESAY, in both his individual and official capacities; JIMMIE LYNN SAYLOR, in both her individual and official capacities; GWEN K. WEST, in both her individual and official capacities

Defendants-Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-2654

MICHAEL S. MATTHEWS, in his own right, and as representative on behalf of a class of plaintiffs similarly situated,

Plaintiff-Appellant,

v.

HOWARD COUNTY, MARYLAND, a charter entity; CHARLES ECKER, in both his individual and official capacities; BARBARA KRANKOWSKI, in both her individual and official capacities; RAQUEL SANUDO, in both her individual and official capacities; JAMES N. ROBEY, in both his individual and official capacities; WAYNE LIVESAY, in both his individual and official capacities; JIMMIE LYNN SAYLOR, in both her individual and official capacities; GWEN K. WEST, in both her individual and official capacities,

Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
J. Frederick Motz, Chief District Judge.
(CA-99-2032-JFM)

Submitted: May 31, 2000

Decided: June 20, 2000

Before LUTTIG, WILLIAMS, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Theodore M. Cooperstein, THEODORE M. COOPERSTEIN, P.C., Washington, D.C., for Appellant. Barbara M. Cook, Howard County Solicitor, Louis P. Ruzzi, Senior Assistant County Solicitor, Ellicott City, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this Circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Michael S. Matthews appeals the order of the district court granting the motion to dismiss or for summary judgment of defendant Howard County, Maryland (County). We affirm.

Matthews first challenges the district court's judgment against him on his Title VII claim. Having reviewed the record, we agree with the district court's holding that Matthews failed to assert a viable claim of employment discrimination that would entitle him to relief. *See Alexander v. Estepp*, 95 F.3d 312, 317 (4th Cir. 1996).

As to his civil rights claims, the district court correctly held that the relevant, three-year statute of limitations had expired before Matthews filed his claim. *See Causey v. Balog*, 162 F.3d 795, 804 (4th Cir. 1998). Section 1986, 42 U.S.C. (1994), contains its own one-year limitation, which was also expired. Nor are we persuaded by any of Matthews's arguments concerning tolling, equitable estoppel, or continuing violation.

Finally, we conclude that the district court did not abuse its discretion in refusing to certify a class. *See United States v. Jones*, 136 F.3d 342, 349 (4th Cir. 1998). We affirm the ruling of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MICHAEL S. MATTHEWS

v. Civil Action No. JFM 99-2032

HOWARD COUNTY, MARYLAND, et al.

*****

ORDER

For the reasons stated in the memorandum entered herewith, it is this 30th day of November 1999

ORDERED

1. defendants' motion to dismiss is granted;

2. plaintiff's motion for partial summary judgment is denied;

3. plaintiff's motion for class certification is denied; and

4. this action is dismissed for failure to state a claim upon which relief can be granted.

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MICHAEL S. MATTHEWS

v. Civil Action No. JFM 99-2032

HOWARD COUNTY, MARYLAND, et al.

MEMORANDUM

Michael S. Matthews claims in this action that he was improperly denied the opportunity to proceed to the final stages of a probationary police officer hiring process initiated by the Howard County Police Department in 1995 due to his race and gender.[1] He asserts claims under Title VII and 42 U.S.C. §§ 1981, 1983, and 1985. Defendants have filed a motion to dismiss.[2] The motion will be granted.

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[1] Plaintiff originally also claimed discrimination on the basis of age, but has amended his complaint to exclude such a charge.

[2] Plaintiff has filed a motion for partial summary judgment on the issue of liability. Since, for the reasons stated in Section II of this memorandum, he has failed to state a claim upon which relief can be granted because he claims no cognizable relief, any opinion I would render on the lawfulness of the selection method used by the County in the 1995 hiring process would be entirely advisory. Accordingly, plaintiff's motion will be denied.

Howard County initiated a hiring process in 1995 to fill 26 vacant probationary police officer positions within the Police Department. The process consisted of the following components: recruitment, physical ability testing, written testing, personal history questionnaire, oral interview, background investigation, conditional offer of employment, polygraph examination, psychological screening,

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Plaintiff has also moved for certification of a plaintiff class. That motion too is denied for four reasons. First, the questions of law and fact common to the members of the purported class do not predominate over questions affecting only individual members, such as issues relating to damages and limitations. Second, a class action is not superior to other available methods for the fair and efficient adjudication of the controversy. To the extent that individual members of the proposed class have cognizable claims against defendants, the common issues relating to the lawfulness of the selection method used in the 1995 hiring process can be adjudicated in a single proceeding and have res judicata effect in any other actions. Third, plaintiff's claim is not typical of the claims of all the members of the purported class since some members of the class received three excellent scores and others (including plaintiff) received only two excellent scores on their interview questions. Fourth, since plaintiff's claim is weaker on the merits than the members of the purported class who received there excellent scores, he could not adequately protect the interests of the latter. See Fed. R. Civ. P. 23.

medical examination, and final selection. At the time the hiring process was initiated in 1995, the Department maintained an affirmative action plan to address a recognized under-representation of women and minorities in the Department and to serve better a diverse urban population.

Matthews applied for a position and began the hiring process. All applicants were required during the physical ability testing to drag a 160-pound body for a distance of 50 feet. After the testing, the dummy was weighed and found to weigh in excess of 160 pounds. All those failing the physical agility test were invited to take the test again. Thirteen women who had failed the test availed themselves of this opportunity, but the one male who had failed the test did not. Those candidates who had passed the test with the heavier dummy were not tested again.

During the interview process, each candidate was asked the same interview questions by each panel of interviewers, and each panel rated the candidate as "excellent," "acceptable," or "unacceptable." Because the Department had limited resources and could not conduct background investigations for a large pool of applicants, and "[b]ecause white males predominated in the group receiving three ratings of 'Excellent,'" the Department determine that it would move all persons receiving three scores of excellent and all women and minorities receiving two scores of excellent and one of acceptable to the background stage of the process. Def.'s Mot. Dismiss at 8. This was done "in an effort to address the goals and objectives established by the Department's

Affirmative Action Plan." Id. Overall, 50 white males, 27 minority males, 10 white females, and 6 minority females receiving three scores of excellent, as well as 14 minority males, 10 white females, and 6 minority females receiving two scores of excellent and one of acceptable, were moved forward to the background phase. There were 30 white males, including the plaintiff, whop had received two ratings of excellent and who were not moved forward to the background phase. The final class of 26 officers chosen included three individuals who had received only two excellent ratings.

The EEOC issued a determination on June 25, 1998, finding that there was cause to believe that "minority and female candidates were treated more favorably than white male candidates with regard to selection decisions for police officer positions," and that there was cause to believe that the County "engaged in a pattern and practice of discrimination with regard to white males as a class." EEOC Determination (June 25, 1998). Although conciliation efforts failed between Matthews and the County, the EEOC and the County reached a conciliation agreement that resolved the EEOC's pattern and practice finding as to white men as a class. As part of that agreement, the County agreed never again to employ the selection method used in the 1995 hiring process that favored women and minorities over white males.

II.

Defendants first argue that plaintiff has failed to state a claim upon which relief can be granted

because he has asserted no claim for cognizable relief. The argument is meritorious.

A.

There is no doubt that, assuming plaintiff was unlawfully discriminated against during the hiring process, this court has the power to order the Police Department now to consider his application for employment. See generally Franks v. Bowman Trans. Co., 424 U.S. 747, 763 (1976) (holding that Title VII "vest[s] broad equitable discretion in the federal courts to 'order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ..., or any other equitable relief as the court deems appropriate'") (citing 42 U.S.C. § 2000e-5(g)); Darnell v. City of Jasper, 730 F.2d 653, 655-56 (11th Cir. 1984) (ordering city to administer a civil service exam to the plaintiff, and to hire him as a police officer if he passed the examination and met the other qualifications for the position). Plaintiff, however, has advised defendants (and stated during oral argument) that he does not wish to be considered for employment by the Police Department at the present time.[3] Thus, plaintiff

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[3] One of the reasons plaintiff does not want to seek employment with the Police Department is that since he submitted his original application, he has been involved in an automobile accident and does not believe that he could pass the physical examination.

does not seek as relief an order that his application be considered.

Instead, plaintiff claims monetary damages stemming from the fact that he was not hired in the first instance. He has alleged no facts that would entitle him to such relief. On the undisputed factual record, it would be speculative to infer that plaintiff would have been hired but for the alleged discrimination. It is true, as plaintiff alleges, that he was among 30 white males who received two ratings of excellent on his interview questions but who, unlike 14 minority males, 10 white females, and 6 minority females receiving only two excellent scores, was not moved forward to the background phase of the hiring process. However, there were 50 white males who had received three, not two, scores of excellent on the interview questions, and there were only 26 slots to be filled. No reasonable fact finder could find that the plaintiff would have been hired over the white males who had received better scores than he. Therefore, the underlying factual premise of plaintiff's damage claim is fatally flawed. Cf. Alexander v. Estepp, 95 F.3d 312 (4th Cir. 1996), cert. denied, 520 U.S. 1165, aff'd, 181 F. 3d 86 (4th Cir. 1999) (finding that applicants could not be awarded any personal relief in action challenging county fire department's affirmative action program, since they did not rank highly enough to have been offered a job even in the absence of program); Pennsylvania State Police v. Penn. Human Relations Comm'n, 517 A.2d 1253 (Pa. 1986) (holding that awarded enrollment in state police academy and back pay was inappropriate because it is impossible

for the employer to anticipate the results of uncompleted steps in an application process).

In his memorandum opposing defendants' motion to dismiss, plaintiff suggests that he is also seeking compensatory damages for intangible harms, including emotional distress, mental anguish, and damage to his reputation. He asserted no such claim in his amended complaint. More fundamentally, he has alleged no facts that would meet the standards of proof established by Fourth Circuit law for a plaintiff seeking such damages. See Price v. City of Charlotte, 93 F.3d 1241, 1254-56 (4th Cir. 1996), cert. denied, 520 U.S. 1116 (1997).

The only other relief sought by plaintiff is an injunction prohibiting defendants from employing in the future the same affirmative selection process they used during the 1995 hiring process. This claim is insufficient for two reasons. First, since plaintiff has forsworn any interest in again applying for employment with the Police Department, the granting of such relief would be entirely academic as to him. Second, the granting of any such injunction lies in my discretion, see 42 U.S.C. § 2000e-5(g)(B) (1991), and I would not exercise my discretion to order the County to refrain from doing something that it has already agreed in its conciliation agreement with the EEOC that it will not do again.

III.

Defendants further assert that even if plaintiff has alleged facts sufficient to state a justiciable claim, all of his claims, other than his Title VII claim, are time-barred.

Maryland has a three year statute of limitations that applies to actions brought under 42 U.S.C. §§ 1981, 1983, and 1985. See Burnett v. Grattan, 468 U.S. 42 (1984). Section 1986 specifically provides for a one year statute of limitations for claims. Federal law determines the accrual of constitutional claims, and dictates that a civil rights claim accrues when facts that would support a cause of action are or should be apparent to the individual who asserts the cause of action, namely at the "point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action." Bireline v. Seagondollar, 567 F.2d 260, 263 (4th Cir. 1977), cert. denied, 444 U.S. 842 (1979); see also Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975); Lewis v. Clark, 534 F. Supp. 714, 716-17 (D. Md. 1982).

Matthews knew of the operative facts giving rise to his cause of action by at least February 20, 1996. On that date, plaintiff wrote a letter to Raquel Sanudo, the County's Chief Administrative Officer, containing information that formed the basis of his later claim. In that letter Matthews alleged discrimination in the hiring process on the bases of sex and race. He wrote, "I believe that I am the casualty of a well intended but misapplied Affirmative Action Plan." Letter from Michael S. Matthews to Raquel Sanudo, Chief Administrative Officer, Howard County 3 (Feb. 20, 1996). Matthews timely pursued his claim with the EEOC, but did not file this suit until July 9, 1999, three months after the EEOC mailed to Matthews a "Notice of Right to Sue" letter.

To circumvent his limitations problems, Matthews asks the Court to apply either the continuing violation theory or the doctrine of equitable tolling in evaluating his constitutional claims. He also suggests that the County may have waived a limitations defense when the County's personnel officer waived time limitations for filing an employee appeal under the Howard County Code. These arguments are unpersuasive.

First, Matthews contends that the Court should toll the operation of limitations for the pendency of the EEOC investigation, which timely began in April 1996 and did not conclude until June 1998. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462-67 (1975), is squarely against this position. There, the Supreme Court rejected the argument that the applicable state law limitations period, in an action brought pursuant to § 1981, will be tolled because a Title VII complaint was pending in the administrative agency. The Court addressed the plaintiff's contention that an individual should not be forced to "split his cause of action." While acknowledging that it was both conceivable and expected that the failure to toll would press a § 1981 complaint into court before the EEOC had concluded its administrative proceedings, the Court identified one obvious answer to this dilemma: that a plaintiff could initiate his § 1981 action, and then ask the Court to stay proceeding until the administrative efforts at conciliation and voluntary compliance were complete. See id. at 465. Indeed, after the passage of 180 days from the filing of his charge of discrimination, Matthews could have demanded a

right-to-sue letter in order to institute the action himself, without waiting for the completion of the EEOC conciliation procedures, see 42 U.S.C. § 2000e-5(f)(1), so that he could join his Title VII claim with timely filed constitutional claims.

Second, as for his allegation of a continuing violation, Matthews cannot use the unsubstantiated claims of unnamed persons participating in selection processes after 1996 to resurrect retroactively constitutional claims as to the discrete wrongs he suffered in 1995. See Marshall v. Manville Sales Corp., 6 F.3d 229, 231 (4th Cir. 1993) (holding that a case involving refusal to hire, unlike a case involving continuous pay disparity, does not raise a present or continuing violation).

Third, Matthews' contention that a factual issue may exist as to whether the county's personnel officer waived the applicable time requirements in her letter dated March 4, 1996, is without merit. The letter offered to waive time frames specified within the Howard County Code in order to hear a personnel grievance, not to waive the limitations periods for filing constitutional causes of action in federal court. Moreover, Matthews does not state that he refrained from filing his constitutional claims based on this written statement.

A separate order effecting the rulings made in this memorandum is being entered herewith.

November 30, 1999

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge